Filed 2/23/10 P. v. Biggane CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HELENE M. BIGGANE, Defendant and Appellant.	A124385 (Humboldt County Super. Ct. No. 075780S)

Defendant Helene M. Biggane appeals after pleading guilty to furnishing a house for use in a large-scale indoor marijuana growing operation. (Health & Saf. Code, § 11366.5, subd. (a).)[1] The court granted her three years' probation, but defendant now challenges numerous conditions of probation, as well as the amount of the fine imposed. Several of defendant's challenges to various conditions of probation were forfeited by failure to assert them at sentencing. We will first discuss the conditions as to which there was no forfeiture. We will then entertain facial constitutional challenges to the remaining conditions to the extent such review is authorized. We ultimately reject all of defendant's challenges, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 18, 2007, Officer Gary Bates of the Arcata Police Department and Humboldt County Drug Task Force received information from another law enforcement

[1] Statutory references are to the Health and Safety Code, unless otherwise designated.

source that a specifically identified house located on 11th Street in Arcata was being used to grow marijuana indoors.[2] Bates sent another officer to make contact with the residents. No one answered the door, but the officer could hear what sounded like fans whirring inside, which is consistent with a marijuana growing operation. He could smell the odor of green marijuana emanating from the house and from several large black plastic bags in the back of a pickup truck parked in the driveway, which was registered to co-defendant John Irwin. The bedroom windows were covered. Defendant's Mercedes was parked in front of the house.

Bates sent two other officers to stay at the house while he obtained a search warrant. The officers then began their search by entering through the unlocked front door after their knock and notice went unanswered. Inside they found mattresses, bedding, and personal items in the living room, which appeared to be used as a sleeping area, able to accommodate two or more people.

Two of the three bedrooms contained growing marijuana plants, 50 plants in one room and 539 in the other. The third was also outfitted to grow marijuana, though no growing plants were found there. The garage had also been converted into a growing room and contained 97 growing plants. The laundry, bathroom, and hallway were used for drying plants.

The police seized a total of 686 growing plants; 95 drying plants with a weight of 58 pounds; 2,315 grams of dried, processed marijuana (106 grams of buds,[3] 2,209 grams of trim; a little over one gram of concentrated cannabis; materials for making concentrated cannabis; scales; packaging materials; pay and owe records; and indicia of residence for both Irwin and defendant. They also seized two handguns. In addition, they found a current medical marijuana card for Irwin and an expired card for defendant. Utility bills (water and PG&E) were found in defendant's name.

---

[2] Because this conviction resulted from a guilty plea, we take the facts from the preliminary examination transcript and the probation report.

[3] The Attorney General recites that 114 grams were found, as does the return on the search warrant, but the testimony supports only 105.56 grams.

Defendant was arrested in December 2007 when she arrived at Los Angeles International Airport, returning to the United States from Nicaragua. She was charged by information filed June 24, 2008 with: (1) unauthorized cultivation, harvesting or processing of marijuana (§ 11358); (2) possession of marijuana for sale (§ 11359); and (3) unauthorized possession of concentrated cannabis (§ 11357, subd. (a)). Added to each of the first two counts was an allegation that the principals were armed with a firearm (Pen. Code, § 12022, subd. (a)(1)). A fourth count of making a building available for manufacture, storage or distribution of a controlled substance (§ 11366.5, subd. (a)), a wobbler, was added by amendment on January 12, 2009. On the same date, defendant entered a negotiated guilty plea to count four, and the other charges were dismissed.

Although she claimed the guns belonged to Irwin, the evidence suggested that defendant, who was 25 years old at sentencing, was fully involved in the marijuana growing operation. Defendant had lived in the Arcata house since 2004. Having grown up in San Diego, she came to Arcata in 2001 to attend Humboldt State University. Her mother and stepfather bought the house for her and a friend to live in while they were in college. Defendant admitted that one or two bedrooms had been used for growing marijuana while she was living there, but claimed it was for personal medical use.[4] (§ 11362.5.) During the summer of 2006, defendant's friend moved out, and Irwin moved in, along with defendant's cousin, Tracie Isbell.

In January 2007, defendant moved to Nicaragua and opened a bar and Mexican restaurant with a friend, using $25,000 from a college fund that had been set up for her by her grandparents. She had received outstanding grades in high school (4.2 grade point average), and said she had received financial aid that made it unnecessary to use her college fund to pay her college expenses. In addition to opening a bar with the money, she bought an acre of land in Nicaragua overlooking the sea.

[4] It appeared from their cross-examination of Officer Bates at the preliminary examination that the defense attorneys would attempt to establish a medical marijuana defense, and for defendant, a claimed lack of knowledge of activities in the house during her absence.

Defendant claimed she had been living in Nicaragua since January 2007, but returned to the United States periodically, usually to visit her family in San Diego. Other than for court appearances, she had not been in Humboldt County from January 2007 to March 2008.

Defendant told the probation officer she had no idea how much marijuana Irwin had been growing in her absence and was "shocked" to learn he had turned virtually the whole house into a marijuana hothouse and packaging plant. She also complained that Irwin kept goats in the back yard and stopped mowing the lawn at the house, which she speculated had prompted the neighbors to turn in the drug-growing operation. She had ended her friendship with Irwin because of the drug bust, claiming she felt "betrayed." Defendant acknowledged the utilities were registered in her name, but claimed she "ignored" the PG&E account, assuming Irwin was paying the bills.

Irwin told the probation department a "sharply contrast[ing]" story, saying that between January 2007 and October 2007, he and defendant split the marijuana he grew. During that period, he had given defendant four or five pounds of marijuana at a time. He claimed defendant was engaged in full-blown marijuana cultivation before he became involved, growing marijuana in two bedrooms of her house and the garage. The third bedroom was also used sometimes for growing when he first moved into the house. All the residents slept in the living room, including defendant.

As a result of these conflicting accounts, the probation officer had trouble crediting all of defendant's statements and concluded she had "most decidedly earned her felony conviction." Between August 2006 and October 2007, the monthly PG&E bills had topped $1,000.00 in twelve months, sometimes going over $2,000.00. Defendant had personally signed checks paying several of those bills ($2,026.47 on January 8, 2007: $1,879.31 on February 9, 2007; $1,239.94 on May 11, 2007; and $1,551.37 on October 9, 2007). Her cousin, Tracie Isbell, wrote one check for $1,850.09 on March 5, 2007. The other monthly utility bills were paid in cash, and Irwin said they were paid by defendant. Also, the monthly bills did not rise dramatically during the period in which defendant claims she was not in Arcata. This tends to cast doubt on defendant's claim that before

she left for Nicaragua the house contained only a small number of medical marijuana plants, and that Irwin, unbeknownst to her, unilaterally expanded it into a commercial enterprise.

With regard to social history, defendant reported that she first drank alcohol at age 17 and had never indulged daily or experienced blackouts. She reported last drinking alcohol six days before her probation interview. When she did drink, she said she usually had three or four drinks.

Defendant reported that she first tried marijuana at age 19 and found it helped her migraine headaches, from which she had suffered all her life. She then obtained a medical marijuana card so she could legally smoke marijuana. She had in the past two years been diagnosed with a more serious condition, occipital neuralgia, in which the exposed occipital nerve had become inflamed, resulting in excruciating pain. In May 2007, defendant received an experimental treatment for her condition in San Diego, in which steroids were injected into the occipital nerve. The treatment appears to have been successful, as she had not experienced further episodes, although she did "feel twinges of pain on occasion." She admitted she still smoked marijuana approximately twice a month for pain, claiming she had a current, valid medical marijuana card.

The court suspended imposition of sentence and granted defendant three years' probation with numerous terms and conditions, including 270 days in county jail. It denied defendant's request that the offense be treated as a misdemeanor, and it denied without comment her lawyer's request that she be allowed to continue using medical marijuana while on probation. It imposed a $10,000 fine (with half suspended pending successful completion of probation), instead of the $2,000 fine recommended by probation.

ANALYSIS

I. Legal framework

A. The Challenged Conditions Of Probation

Defendant challenges 11 conditions of probation that fall into several categories: (1) prohibition of possession of weapons (Nos. 8, 9 & 10); (2) alcohol abstinence, alcohol

testing, and ban from places whose chief item of sale is alcohol (Nos. 12, 13 & 14); (3) chemical testing for controlled substances (No. 19); (4) counseling as directed by her probation officer (No. 21); (5) alcohol-substance abuse assessment (No. 22); (6) mandatory prescription medication (No. 23); and (7) a $10,000 fine (No. 25).

B. General Legal Principles

People v. Lent (1975) 15 Cal.3d 481 (*Lent*) established three requirements before a probation condition may be deemed an unreasonable exercise of discretion: (1) it must have no relationship to the crime of which the offender was convicted, (2) it must relate to conduct which is not in itself criminal, and (3) it must require or forbid conduct which is not reasonably related to future criminality. (*Id.* at p. 486.) Thus, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long [as] the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 380.) Thus, trial courts enjoy broad discretion to devise appropriate conditions of probation, so long as they are intended to promote the "reformation and rehabilitation" of the probationer. (Pen. Code, § 1203.1, subd. (j).)

C. Forfeiture

Defendant did not object in the trial court to the weapons-related conditions of probation, the counseling or medication requirements, or the amount of the fine. She thereby forfeited her challenges to probation condition Nos. 8, 9, 10, 21, 23 and 25. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.) Despite such forfeiture, defendant may raise for the first time on appeal an argument that the conditions suffer from facial vagueness or overbreadth, so long as the claim presents a pure question of law, easily remediable on appeal, without reference to the particular sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 886-887; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1435.)

D. The role of *Harvey*

The parties dispute the significance of the fact that defendant did not enter a *Harvey* waiver. (*People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).) *Harvey* held that the

facts underlying a dismissed count cannot be used by the court to increase the defendant's sentence in the absence of a waiver by the defendant. (*Id.* at p. 758.) *People v. Beagle* (2004) 125 Cal.App.4th 415, 421, held that *Harvey* also forbids using such facts for purposes of imposing conditions of probation. That question is now pending before the Supreme Court.[5]

Even assuming *Harvey* applies to conditions of probation, it is undisputed that a defendant must raise a *Harvey* issue in the trial court, or it is forfeited. (*People v. Beagle*, *supra*, 125 Cal.App.4th at p. 420.) Defendant did not raise a *Harvey* issue in the trial court. Thus, any reliance the court may have placed on facts underlying dismissed counts must be overlooked.

In addition, the facts relating to the dismissed counts, insofar as they related to the amount of marijuana grown and defendant's role in the operation, were "*transactionally related*" to the conviction, which makes their use allowable under *Harvey*. (*Harvey*, *supra*, 25 Cal.3d at p. 758.) The facts relating to the guns are the only ones arguably covered by *Harvey*, and defendant raised no *Harvey* issue below regarding the use of those facts. Defense counsel argued that the guns were not hers, but he did not argue that consideration of the presence of the guns to impose conditions of probation would violate *Harvey*.

[5] On October 22, 2009, the Supreme Court granted review in *People v. Martin* (No. S175356), previously published at 175 Cal.App.4th 1252, which held that *Harvey* does not apply to probation conditions.

II. Issues Not Forfeited

A. Conditions related to alcohol[6]

Defendant argues that alcohol played no role in her underlying crime, and her social history indicates she is a social drinker who does not drink daily or have a problem with alcoholism. Therefore, she claims, the alcohol-related conditions of probation were unreasonable under the test of *Lent, supra,* 15 Cal.3d at p. 486.

Conditions of probation requiring alcohol abstinence have been upheld by the courts when alcohol was a factor in the underlying offense (e.g., *Gilliam v. Municipal Court* (1979) 97 Cal.App.3d 704, 708-709), or when the conviction was drug-related and the probationer had a history of alcoholism or other substance abuse (e.g., *People v. Beal* (1997) 60 Cal.App.4th 84, 86-87, & fn. 1 (*Beal*); see generally, *Propriety of Requirement, as Condition of Probation, That Defendant Refrain from Use of Intoxicants,* 46 A.L.R.6th 241, 260 (2009).)

Defendant relies primarily on *People v. Kiddoo* (1990) 225 Cal.App.3d 922, 927-928,[7] disapproved on other grounds in *People v. Welch, supra,* 5 Cal.4th at page 237, to advocate a different result here. In *Kiddoo,* the defendant was charged with possession of both methamphetamine and marijuana for sale, and pled guilty to straight possession of methamphetamine. (*Kiddoo, supra,* 225 Cal.App.3d at pp. 925, 927.) Defendant had "become involved in the sale of drugs to support a gambling habit." (*Id.* at p. 927.) However, he had also "used marijuana, methamphetamine, amphetamine, cocaine and

---

[6] The alcohol-related conditions were:

"12. Defendant shall totally abstain from the use of alcoholic beverages and shall not have in her possession or under her custody or control any alcoholic beverage.

"13. Defendant shall submit to chemical testing for the use of alcohol at any time as directed by a probation officer or other law enforcement officer. Further, defendant shall pay a reasonable fee for this testing. []

"14. Defendant shall not enter places where alcohol is the chief item of sale."

[7] Defendant erroneously refers to *Kiddoo, supra,* 225 Cal.App.3d 922, as a decision of this Division. That opinion was issued by Division Two of the Fourth Appellate District.

alcohol since he was 14," and he continued to drink and to use methamphetamine "sporadically." (*Ibid*.)

Still, the court concluded he had " 'no prior problem' " with alcohol, calling him a "social drinker." (*Kiddoo, supra,* 225 Cal.App.3d at p. 927.) It therefore struck alcohol-related conditions of probation, similar to those in this case, because the crime was not alcohol-related and the forbidden conduct was not itself illegal. (*Id.* at pp. 927-928.) Because Kiddoo's past drug abuse had involved substances other than alcohol, the court believed the alcohol conditions were not reasonably related to future criminality. (*Id*. at p. 928.)[8]

We regard *Kiddoo, supra,* 225 Cal.App.3d 922, as an aberration of limited enduring validity.[9] Even before *Kiddoo* was decided, *People v. Smith* (1983) 145 Cal.App.3d 1032 recognized a "nexus between drug use and alcohol consumption" and noted that "the physical effects of alcohol are not conducive to controlled behavior." (*Id*. at p. 1035.) *Smith* upheld conditions of probation forbidding alcohol use and presence at alcohol-sale premises where the defendant's conviction for PCP possession was related to a long history of drug use, and defendant was "emotionally unstable" and had "a poorly

---

[8] Defendant also cites *People v. Burton* (1981) 117 Cal.App.3d 382, 389-391, which struck alcohol-related conditions for a probationer convicted of assault, citing lack of evidence of prior convictions for alcohol-related offenses or of any propensity by defendant to become assaultive when using alcohol. *Burton* had not been drinking at the time of the assault, and thus the offense was not alcohol or drug-related. Further, the opinion indicates no history of drug or alcohol problems for the defendant. This distinguishes it from the general rule set forth above, and from the case before us in that defendant's crime was drug-related.

[9] *Kiddoo, supra,* 225 Cal.App.3d 922, has been criticized in the ensuing years in two cases from a different division of the Fourth District, based not only on disagreement with "the fundamental assumptions in *Kiddoo* that alcohol and drug abuse are not reasonably related and that alcohol use is unrelated to future criminality where the defendant has a history of substance abuse" (*Beal, supra*, 60 Cal.App.4th at p. 87), but also as being "inconsistent with a proper deference to a trial court's broad discretion in imposing terms of probation[.]" (*People v. Balestra* (1999) 76 Cal.App.4th 57, 69 (*Balestra*).)

integrated personality." (*Ibid*.) The court found the alcohol prohibitions were "reasonably related to . . . future criminality." (*Ibid*.)

Likewise, in *People v. Lindsay* (1992) 10 Cal.App.4th 1642 (*Lindsay*), Division Three of this district upheld alcohol abstinence conditions of probation where the defendant pled guilty to selling cocaine. (*Id.* at pp. 1643-1645.) Because the defendant had an " 'alcohol problem' " and an "addictive personality"—and admitted he sold cocaine to support his addiction—the alcohol prohibition was deemed valid. (*Id.* at pp. 1644-1645.) *Lindsay*, like *Smith*, *supra*, 145 Cal.App.3d 1032, found that alcohol had a potential to impair judgment, thereby increasing the likelihood of future illicit drug relapse, which established the necessary link to future criminality. (*Lindsay*, *supra*, 10 Cal.App.4th at p. 1645.)

Again, in *Beal*, *supra*, 60 Cal.App.4th 84, a case involving possession of methamphetamine and possession of methamphetamine for sale, the court relied on both "common sense" and "empirical evidence" to find a reasonable nexus between alcohol consumption and illegal drug use, despite the defendant's claim that she did not have a problem with alcohol and was a "social drinker." (*Id*. at pp. 86-87, & fn. 1.) *Beal*, too, noted that alcohol lessens self-control and therefore may reduce the user's ability to stay away from illegal drugs. (*Id.* at p. 87.) It further observed that many drug treatment programs prohibit alcohol use by participants. (*Ibid.*) Thus, *Beal* held that alcohol use is related to future criminality where the defendant has a history of substance abuse and stands convicted of a drug-related crime. (*Ibid.*)

In this case, the court acted within its discretion in imposing the alcohol-related conditions of probation. It grounded its decision in part on the notion that staying clean and sober helps probationers live up to the other terms of their probation. While that may be true, such a rationale would allow imposition of abstinence conditions on every probationer. We do not think this reason alone is sufficient to sustain the alcohol-related conditions.

However, in this case there is more to suggest that substance and/or alcohol abuse may have played a part in defendant's criminality. Although the conviction was only for

providing the premises, defendant was involved in—indeed, probably the ringleader of[10]—a large-scale marijuana growing operation, from which she admittedly reaped illegal profits. We have no problem concluding her crime was drug-related.

Whether defendant herself has a history of alcohol or substance abuse is a tougher question, but her claim that she had never been a daily drinker does not negate that possibility. Some alcoholics are binge drinkers, not daily drinkers. Defendant said she usually has three or four drinks when she does imbibe. While not necessarily problematic, that quantity is not entirely characteristic of a moderate social drinker.

More importantly, the probation officer expressed considerable skepticism about whether defendant was telling the whole truth during their interview, we think with good reason. Defendant's minimization of her role in the marijuana growing operation reasonably supports an inference that she may have also understated her habits with alcohol and drugs.

Defendant's parents divorced when she was a child in large part because of her father's alcoholism and resultant loss of employment. Thus, to the extent there is a genetic predisposition to alcoholism or addiction, defendant falls within the at-risk class.[11]

Defendant herself, an intelligent, college-educated woman, decided to use her "college fund" (or, if the probation officer's and district attorney's suspicions are correct, the proceeds of her marijuana growing operation) to open a bar in Nicaragua. Selling illegal drugs to finance the acquisition and operation of a bar may suggest an unhealthy intoxicant-centered lifestyle from which this talented young woman should be encouraged to disassociate herself.

---

[10] The court commented at sentencing that defendant "convert[ed] this home to basically just a marijuana growing operation," with the "entire house . . . simply a marijuana enterprise." It also noted that defendant "was the person providing the premises," and therefore could be attributed "even a greater degree of fault than . . . Irwin."

[11] Pandey, *Biochemical Markers of Predisposition to Alcoholism*, Alcohol Health & Research World (Fall 1990) Vol. 14, No. 3, pages 204-209.

The sentencing court also noted "a nexus between intoxicants—whether it be drugs and/or alcohol or other items." This is consistent with the reasoning of *Smith*, *supra*, 145 Cal.App.3d 1032, *Lindsay*, *supra*, 10 Cal.App.4th 1642, and *Beal*, *supra*, 60 Cal.App.4th at page 87, including *Beal*'s observation that the "vast majority" of drug treatment programs forbid participants to use alcohol, as well as their substance of choice. Thus, regardless whether defendant had specific problems with alcohol abuse, to the extent she had a history of marijuana abuse, an alcohol abstinence condition would be justified.

The fact that she had a legal medical marijuana card does not eliminate the possibility that she abused the substance in an unhealthy way. Initially, she opted to use medical marijuana instead of prescribed conventional medication for her migraines. There is no crime in that. But her personal medical use eventually morphed into a large-scale illegal growing operation. Given the quantities she and Irwin were growing, it appears that marijuana came to occupy a place much larger and more central to her lifestyle than its simple efficacy in relieving occasional migraine pain.

Her personal use continued over a period of at least six years, including after an experimental procedure had largely relieved her headache pain. Irwin claimed that, during the months immediately preceding her arrest, defendant had up to five pounds of marijuana at her disposal at times, or far more than an amount reasonably possessed for "personal medical purposes" under the Compassionate Use Act of 1996 (§ 11362.5). At the time of the raid on the Arcata house, in addition to 781 growing and drying plants, far more than legitimately needed for personal medical purposes, police also found more than five pounds of dried, processed marijuana, apparently ready for use or sale.[12]

Based on these factors, we—like the probation officer—find questionable defendant's report that she used marijuana only "a couple of times per month." It may be inferred that she either sold a lot of marijuana, used much more than she acknowledged,

[12] The 2,315 grams of dried, processed marijuana found in the house constitutes more than five pounds, in addition to 58 pounds of drying plants and hundreds of growing plants.

or both. Whether she, in fact, has a substance abuse problem, or whether she ran the marijuana-growing operation strictly as a business venture, remains uncertain. It is entirely possible, however, that her own use of marijuana and/or alcohol tainted her judgment as to how she should employ her entrepreneurial skills.

Consequently, we cannot say there was a complete absence of alcohol or substance abuse in defendant's background so as to make the alcohol-related conditions unreasonable. In light of our conclusion that an abstinence provision was valid, we find no error in the additional imposition of an alcohol testing condition. (*Balestra, supra,* 76 Cal.App.4th at p. 68.)

Defendant also challenges the condition prohibiting her from being in places "where alcohol is the chief item of sale" on grounds that it impermissibly infringes on her constitutional rights of travel and association. The right to travel, however, is not absolute and may be reasonably restricted in the public interest. (*In re White* (1979) 97 Cal.App.3d 141, 149-150.) The condition precluding defendant from entering alcohol-sale premises does not prevent defendant from traveling anywhere, or from associating with whomever she pleases, wherever she pleases, except in bars and liquor stores. Defendant cites no precedent holding such a limited restriction to be unconstitutional.

Indeed, even if it did incidentally impinge on a constitutional interest, the ban from alcohol-sale premises reinforces the no-alcohol condition by keeping defendant away from places where she might be tempted to purchase or consume alcohol. The no-alcohol condition in turn furthers the goal of preventing defendant from committing future drug-related crimes. Thus, the alcohol-premises condition serves the state's compelling interest in rehabilitation without unduly infringing on defendant's rights to travel and freely associate.

B. Controlled substance testing[13]

Likewise, requiring defendant to submit to testing for controlled substances upon her probation officer's request was eminently reasonable. Controlled substance and alcohol testing have been approved as reasonable conditions of probation. (See generally, *Propriety of Conditioning Probation on Defendant's Submission to Drug Testing*, 87 A.L.R.4th 929, 935-936 (1991).) Drug testing is specifically recognized as a "treatment tool" for those with substance abuse problems. (Pen. Code, § 1210.5.)

Defendant told the probation officer that she had a current medical marijuana card, and her attorney requested that she be allowed to continue using medical marijuana while on probation. The record reflects no express discussion of that request, but it was clearly denied, since the court imposed all of the recommended conditions of probation, including a no-medical-marijuana condition (No. 17). No issue has been raised on appeal regarding the imposition of that condition. Thus, the prohibition on defendant's use of marijuana while on probation—even for medical purposes—stands unchallenged.

Defendant admittedly has used marijuana for medical reasons since approximately 2002 and continued doing so "a couple of times per month" even up to the time of sentencing. Since she has now been forbidden to continue that practice, the court had a legitimate basis for insisting on chemical testing to determine whether she is abiding by that condition of probation.

Indeed, in the case of a "conviction of any offense involving the unlawful possession, use, sale, or other furnishing of any controlled substance,"[14] chemical testing is a mandatory condition of probation. (Pen. Code, § 1203.1ab.) While possession, use or furnishing were not elements of defendant's conviction (§ 11366.5, subd. (a); *People v. Sanchez* (1994) 27 Cal.App.4th 918, 923; see also *People v. Dillon* (2007) 156

---

[13] "19. Defendant shall submit to chemical testing for the use of controlled substances at any time as directed by a probation officer or other law enforcement officer. Further, defendant shall pay a reasonable fee for this testing, pursuant to Section 1203.1ab of the California Penal Code. . . ."

[14] Marijuana is a controlled substance. (§ 11054, subd. (d)(13).)

Cal.App.4th 1037, 1045-1046), it may reasonably be inferred that marijuana was, in fact, unlawfully furnished to others and that defendant participated in and profited from the distribution. But regardless whether controlled substance testing was mandated under Penal Code section 1203.1ab, it was certainly not an abuse of discretion to impose a testing condition.

In *Balestra, supra*, 76 Cal.App.4th 57, the defendant pled guilty to elder abuse of her mother. (*Id*. at p. 61.) The defendant smelled of alcohol at the time of the abuse, and the trial court stated that "everybody" involved in the case appeared to agree she had an alcohol problem. (*Id*. at pp. 61-62.) The trial court imposed a drug- and alcohol-testing condition at sentencing, which Balestra objected to on grounds that it included drug testing, whereas no drugs had been involved in her offense. (*Id*. at p. 62.) The court nevertheless upheld the validity of that condition. (*Id.* at p. 69.) *Balestra* clearly supports a drug- and alcohol-testing requirement in the present case. Controlled substance testing will allow the probation officer to monitor defendant's progress and will provide information needed to help defendant get her life back on track. (See *ibid.*)

C. Alcohol and controlled substance abuse assessment[15]

Defendant has cited no authority for her argument that a drug and alcohol assessment is an impermissible condition of probation. Again, we think this is a reasonable condition of probation in the circumstances. Defendant was involved in growing large quantities of marijuana. There is reason to suspect she underreported her own use of alcohol and other intoxicants. Defendant cannot insist that the probation officer and court accept at face value her own report of drug and alcohol use when other information is available to the probation department that tends to call into question her credibility. Ordering a professional assessment was a good first step to addressing

[15] "22. Defendant shall undergo an alcohol/drug assessment as directed by the probation officer and shall comply with all recommendations contained in said assessment as directed by the probation officer. Should defendant be required to attend residential treatment, said treatment shall be at her own expense. Defendant shall waive the right to *all* incarceration credits for time served in the treatment program unless she successfully completes *all* phases of the program."

defendant's problem, if she has one, and may be a valuable tool in designing a program for the reformation and rehabilitation of the probationer.

III. Issues Forfeited by Failure to Object

A. Possession of weapons[16]

As noted above, any challenge to the reasonableness of the weapons-related conditions of probation, as well as any claim of *Harvey* error, were forfeited by failure to object in the trial court. In addition, any Second Amendment challenge on the basis of *District of Columbia v. Heller* (2008) ___ U.S. ___ [128 S.Ct. 2783, 171 L.Ed.2d 657] (*Heller*) was forfeited by failure to object on that basis, as the sentencing in this case postdated *Heller* by several months. (Cf. *People v. Villa* (2009) 178 Cal.App.4th 443, 448; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310-311 (*Yarbrough*).) Thus, to the extent any claim of error may be raised on appeal, it must be addressed to the facial vagueness or overbreadth of the condition, not its reasonableness in the present case. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 886-887; *People v. Turner*, *supra*, 155 Cal.App.4th at p. 1435.)

A constitutional claim necessarily must fail with respect to condition No. 8, the complete ban on firearm possession. Such restrictions have historically been accepted as

---

[16] The weapons-related conditions were as follows:

"8. Defendant shall not own, possess, have in her vehicle or residence, any firearm, any ammunition that can be used in a firearm, or any other deadly weapon, whether owned by defendant or not.

"9. Defendant shall not own, possess, have in her vehicle or residence, any instrument or device which a reasonable person would believe to be capable of being used as a firearm.

"10. Defendant shall not own, possess, or have in her vehicle any knife with a blade longer than 2 inches, except kitchen knives which must be kept in her residence and knives relating to her employment."

valid.[17] Indeed, as a convicted felon, defendant would be prohibited from possessing firearms even without the condition. (Pen. Code, § 12021, subd. (a).) In addition, Penal Code section 12021, subdivision (d), expressly recognizes that firearm possession may violate a condition of probation even for non-felons.

The Supreme Court's decision in *Heller, supra*, ___ U.S. ___ [128 S.Ct. 2783] had no impact on the validity of such provisions. (*Id.* at ___ U.S. ___ [128 S.Ct. at pp. 2816-2817] [the Court's opinion "should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"]; cf. *People v. Villa, supra*, 178 Cal.App.4th at pp. 448-449 [statute forbidding juvenile wards who committed violent crimes to possess firearms until they attain age 30]; *People v. Flores* (2008) 169 Cal.App.4th 568, 573-575 [possession by one convicted of violent misdemeanor]; *Yarbrough, supra*, 169 Cal.App.4th at pp. 313-314 [concealed weapons].) Defendant raises no legitimate issue of vagueness or overbreadth. (Cf. *In re R.P.* (2009) 176 Cal.App.4th 562, 566-567 [" 'deadly or dangerous weapon' " not vague]; *People v. Rodriquez* (1975) 50 Cal.App.3d 389, 398 [" 'deadly weapon' " not vague].) The condition is facially constitutional.

Condition No. 9 prohibits defendant from possessing "any instrument or device which a reasonable person would believe to be capable of being used as a firearm." Though defendant implies the scope of the condition is practically incomprehensible, it appears to be a standard condition of probation when weapons possession is forbidden, evidently intended to prevent probationers from possessing replica weapons. Forbidding possession of replica firearms enhances the enforcement of the no-firearms condition by preventing a probationer in possession of a real firearm from claiming he didn't know it was real. Aside from plugging this loophole, condition No. 9 prevents probationers from committing future crimes using replica weapons. The question is not whether the

[17] We are aware that *People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752, modified a weapons possession condition of probation to prohibit only knowing possession. No similar argument regarding a knowledge requirement was raised by defendant in this case with respect to Condition No. 8.

condition was reasonably applied to this defendant, but whether it is so vague or overbroad as to violate the constitution. We conclude it is not.

Condition No. 10 restricts defendant's possession of knives with blades longer than two inches, except kitchen knives and knives used in her employment. Defendant raises no issue of vagueness. Perhaps she raises one of overbreadth. We think, though, that if a weapon was involved in the offense—and here two firearms were found at the site—then restrictions on weapon possession, whether the same or a different type of weapon, are reasonably related to the offense. Therefore, we would reject this argument, even if it had not been forfeited.

B. Counseling required by probation officer[18]

The requirement that defendant submit to counseling at the probation officer's direction also was forfeited by failure to object. (*People v. Welch*, *supra*, 5 Cal.4th at pp. 234-235.) Again, however, a facial constitutional challenge is available so long as it presents a pure question of law, remediable by modification in this court, without reference to the particular sentencing record. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 886-887.)

Though the word "counseling" conceivably could be construed to include any sort of professional advice-giving, we must afford the term a practical, everyday construction. (Cf. *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 40 [" ' "usual, ordinary import of the language" ' "].) The word "counseling" is commonly associated with psychological therapy, with one definition being "professional guidance of the individual by utilizing psychological methods esp[ecially] in collecting case history data, using various techniques of the personal interview, and testing interests and aptitudes." (Webster's 9th New Collegiate Dict. (1983) p. 296, col. 2.)

[18] "21. Defendant shall attend, actively participate in and follow all the rules and directions of a counseling program or programs, at her own expense, as deemed necessary by the probation officer. Duration of such counseling to be determined by the probation officer."

We also read the condition with the presumption that the court intended to authorize the probation officer to exercise only lawful discretion.[19] Though a condition of probation may be subject to an interpretation that would allow a probation officer to exercise abusive authority, that hypothetical possibility will not cause the condition to be unlawful per se. (See *People v. Olguin*, *supra*, 45 Cal.4th at p. 383 [though pet-notification condition of probation "literally encompasses the gamut of pets from puppies to guppies," it did not authorize probation officer to issue irrational directive]; *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240-1241 ["Since the court does not have the power to impose unreasonable probation conditions, it could not give that authority to the probation officer . . . ."].) Thus, we do not read condition No. 21 as requiring defendant to seek psychiatric treatment upon her probation officer's demand, much less the guidance of a life coach or spiritual adviser.

The context curtails the condition even more. Condition No. 21 orders defendant to "attend, actively participate in and follow all rules and directions of a counseling program or programs" specified by her probation officer.[20] Reading that language in conjunction with the other conditions of probation, we find it is limited to counseling related to drug and alcohol abuse.

---

[19] "Although probation officers may be given 'wide discretion to enforce court-ordered conditions' (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373), they may not create conditions not expressly authorized by the court (*id*. at pp. 1372-1373)." (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1354, 1358.) In addition, a probationer may not be ordered, even by the court, to seek "psychiatric treatment" where there is no evidence that he "need[s] psychiatric care" or that his "mental instability contributed to [the] offense." (*In re Bushman* (1970) 1 Cal.3d 767, 777, overruled on other grounds in *Lent*, *supra*, 15 Cal.3d at p. 486, fn. 1; see also, *U.S. v. Heath* (11th Cir. 2005) 419 F.3d 1312, 1315.)

[20] The language employed is suggestive of group therapy more than individual therapy, where "rules" and "programs" would have little meaning. This factor increases our confidence that the counseling requirement was intended to supplement and reinforce the other drug and alcohol conditions ordered by the court, as group counseling is frequently employed in that context.

The court's overall strategy for addressing such issues was first to determine the degree to which substance abuse may pose an obstacle to defendant's rehabilitation and reformation, and then to address the issue as needed. The court-ordered drug and alcohol assessment (No. 22) presumably will result in certain recommendations or findings. The probation officer is then authorized under condition No. 21 to direct defendant to participate in counseling consistent with that assessment. Thus, the unelaborated requirement that defendant submit to "counseling," when read in context, refers to group or individual talk therapy specifically addressed to drug and alcohol issues.

Ordering a probationer to participate in drug and alcohol counseling is unquestionably valid.[21] Whenever a court grants probation to anyone convicted of a "controlled substance offense" under Chapter 6, Division 10 of the Health and Safety Code (which includes defendant's conviction), "the trial court shall, as a condition of probation, order that person to secure education or treatment from a local community agency designated by the court, if the service is available and the person is likely to benefit from the service." (§ 11373, subd. (a).) "Counseling" would qualify as a form of "education or treatment" under that provision. Similarly, section 11376 provides that for "any offense involving substance abuse" the court may order that a defendant "participate in and complete counseling or education programs." Although it has not been conclusively established that defendant's crime involved "substance abuse," there are indications in the record sufficient to suggest she could benefit from a drug and alcohol assessment, followed by counseling if recommended.

---

[21] Psychological counseling and treatment may be ordered by a court where the social history of the probationer suggests that it may help to prevent future criminality. (*In re Todd L.* (1980) 113 Cal.App.3d 14, 20-21 [juvenile].) Indeed, probation conditions requiring the defendant to seek and complete psychological counseling are not uncommon (e.g., *People v. Gudger* (1994) 29 Cal.App.4th 310, 315 [psychological counseling ordered for defendant who threatened to kill judge]; *People v. Breaux* (1980) 101 Cal.App.3d 468, 469, 471 [psychiatric treatment ordered for voyeur]), including psychological counseling related to drug problems (e.g., *People v. Koester* (1975) 53 Cal.App.3d 631, 634), and residential drug treatment (e.g., *People v. Johnson* (2002) 28 Cal.4th 1050, 1052, 1056-1057).

In light of the common understanding of the word "counseling," read in the context of the conditions of probation, and in light of the various statutory provisions using the word "counseling" in the context of substance abuse treatment,[22] we cannot find the condition of probation was unconstitutionally vague or overbroad.

C. Medication requirement

Condition No. 23 requires defendant to "ingest medication as prescribed by her physician and/or psychiatrist." Again, any challenge to the reasonableness of this condition was forfeited by failure to object below. (*People v. Welch*, *supra*, 5 Cal.4th at pp. 234-235.)

We recently dealt with a similar condition of probation for a juvenile offender in *In re Luis F.* (2009) 177 Cal.App.4th 176 (*Luis F.*). There we modified a condition of probation that ordered a juvenile to " 'continue taking prescribed medications, as directed[,]' " so that it required him to take only those medications prescribed for depression and social anxiety disorder. (*Id*. at pp. 180, 192.) We expressly noted that the issue had been forfeited by failure to object, but we elected to address it anyway due to the significant liberty and privacy interests at stake,[23] as well as the availability of a ready remedy. (*Id*. at p. 183.)

In this case we decline to excuse the forfeiture. While the broadly worded condition of probation is troubling in its failure to specify which medications defendant must take or for what conditions, we will not address its constitutionality on the present record.

---

[22] The word "counseling" is frequently used in statutes relating to drug and alcohol treatment. (E.g., Pen. Code, § 1203.096 [where defendant sentenced to prison, court may recommend "counseling" as part of prison program if drugs and alcohol were involved in the crime or defendant's background].) Indeed, "psychological counseling" is specifically recognized in other legislation as a " 'drug-related condition of probation.' " (Pen. Code, § 1210.1, subd. (g).)

[23] These issues have generally arisen in the area of antipsychotic drugs that present significant health risks and seriously affect the individual's personal autonomy, as well as procedures that intrude significantly on bodily integrity, privacy and sexual function. (*Luis F.*, *supra*, 177 Cal.App.4th at pp. 183-188, & fn. 6.)

Not all constitutional challenges, nor even all challenges based on vagueness or overbreadth, are exempted from the ordinary rule of forfeiture. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 886-887.) Rather, only where the facial constitutional issue can be remedied by modification on appeal without remand should the courts excuse a failure to object in the trial court. (*Ibid*.) In *Luis F.*, *supra*, 177 Cal.App.4th 176, the record allowed us to clearly discern the types of medication the court intended the ward to take, and we modified the condition of probation accordingly. (177 Cal.App.4th at pp. 189-191.)

In this case, however, we deal with unspecified medications having unknown risk factors.[24] The record does not identify any pain medication or other medication currently prescribed by defendant's doctor, nor does it otherwise shed light on which medications the court intended defendant to take. Since we are not confident we could accurately implement the trial court's intention by defining more narrowly the class of medications covered by the probation condition, we cannot easily remedy the problem on appeal.

Sheena K. counsels us to apply the rule of forfeiture in such circumstances, and we follow that advice. (*Sheena K., supra,* 40 Cal.4th at pp. 886-887, 889.) If the probation officer were to attempt to enforce the medication requirement in an unreasonable manner, then defendant may request a modification of the condition. (Pen. Code, § 1203.3.)

---

[24] The purpose of the medication condition may have been related to defendant's problem with pain, either from migraines or occipital neuralgia. She had originally been prescribed a pain medication by the Humboldt State student health service, but she opted for medical marijuana instead. The court may have believed if defendant took more conventional prescription pain medications, she could more easily abstain from the use of marijuana.

Defendant did not object or question the scope of the condition at sentencing, despite having obtained a continuance so her lawyer could review the probation report more thoroughly and "go over it with" defendant. Perhaps defendant herself understands what is expected of her under the medication requirement based on discussions with her probation officer.

D. $10,000 fine

Not only was the issue of the amount of the fine forfeited by failure to object, but it is unmeritorious. The fine was not unlawful. (Pen. Code, § 672.) Defendant was told at the change of plea hearing that she could be fined "up to at least $10,000." She was also told that she could withdraw her plea if the court failed to impose the sentence anticipated under the plea agreement.

Neither defendant nor her attorney spoke up when the court actually imposed the maximum fine. Since she had substantial assets in Nicaragua and had regularly been paying as much as $2,000.00 per month or more for PG&E bills in order to finance her marijuana growing operation, presumably the court believed that a stiff fine would be necessary to get this young woman's attention. Half of the fine has been stayed pending successful completion of probation. This will serve as a good incentive for her to perform well on probation.

DISPOSITION

The order granting probation on the conditions specified is affirmed.

_____
Richman, J.

We concur:

_____
Haerle, Acting P.J.

_____
Lambden, J.